

**STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION**

Illinois Bell Telephone Company)	
)	
)	Docket 03-0323
Petition to Determine Adjustments to UNE)	
Loop Rates Pursuant to Section 13-408)	
Of the Public Utilities Act)	

**BRIEF ON EXCEPTIONS OF XO ILLINOIS, INC., CIMCO
COMMUNICATIONS, INC. AND FORTE COMMUNICATIONS, INC.**

Pursuant to 200.830 of the rules of the Illinois Commerce Commission (“Commission”), 83 Ill. Adm. Code Section 200.830, XO Illinois, Inc., (“XO”), CIMCO Communications, Inc., (“CIMCO”) and Forte Communications Inc. (“Forte”) hereby submit their Brief On Exceptions in response to the Proposed Order issued by the Administrative Law Judges (“ALJ”) in the above-captioned matter.

INTRODUCTION

The General Assembly commanded the Commission to abate docket 02-0864 and develop revised UNE rates (by adopting SBC’s positions) within 30 days of the enactment of Section 13-408. The Proposed Order acknowledges that there is insufficient time to conduct a detailed investigation and review of the model inputs. Proposed Order at 12. Recognizing the extreme nature of the General Assembly’s mandate, the Proposed Order notes that it is “not ruling on the propriety of the input proposals advanced by any of the parties, but rather that the propriety of the inputs is beyond the scope of this proceeding.” Id. According to the Proposed Order the

Commission's hands were tied by the Illinois General Assembly. Thus, the Proposed Order determined that the Commission has simply been commanded to adopt SBC's position with respect to fill factors and depreciation rates. *Id.* at 13. SBC, however, has not complied with Section 13-408. Rather than present the Commission with rates reflecting the adjustment of current rates using only the legislatively mandated fill factors and depreciation rates, SBC has determined rates using the hundreds of assumptions and inputs contained in its Docket 02-0864 proposal. Because SBC has failed to comply with the new statute, UNE rates cannot be adjusted.

Moreover, the procedure used in this proceeding violates a host of statutes and Commission rules. XO, CIMCO and Forte acknowledge that the General Assembly put the Commission in a nearly impossible position. However, the General Assembly's mandate does not justify throwing due process and the Commission's rules of practice out the window.

ARGUMENT

I. THE PROPOSED ORDER FAILS TO ACKNOWLEDGE THE PROCEDURAL DEFICIENCIES IN THIS PROCEEDING THAT HAVE DENIED CLECS' DUE PROCESS.

SBC has a statutory mandate to demonstrate that its rates are just and reasonable under state and federal law. It is SBC's burden to prove that its new rates comply with the Federal Communications Commission's TELRIC pricing rules. SBC has not met that burden. The ALJ, CLECs and Staff all agree that Section 13-408 provides a woefully inadequate amount of time to determine the merits of SBC's rate increase. The

Commission, however, has undertaken this mad rush at the expense of parties' due process rights.

The record is not clear on the basis for any Commission order in this proceeding. While the proposed order refers to running of calculations and SBC makes reference to cost of service studies, it is undisputed that no cost studies were conducted for this limited process. The Commission's decision must be based on the evidence that has been properly introduced into the record of the proceeding. *Cerro Copper Products v. Illinois Commerce Commission*, 83 Ill.2d 364, 369-70 (1980). There is insufficient record support for the Commission's decision. Moreover, even the affidavits SBC allegedly submitted (Proposed Order at 4) were never served on the parties to this case.¹ Sending documents or information to the ICC without providing copies to the parties is illegal and a further reason any eventual order herein has little chance of be sustained on appeal. The Commission improperly allowed SBC to submit supporting affidavits after "comments" had already been filed. The additional information submitted by SBC was never admitted to the record in 02-0864, the affiants were not subject to cross examination in that docket, and the affiants were not subject to cross examination in this proceeding. Nevertheless, SBC's supporting affidavits were admitted into the record in this proceeding irrespective of the violation of the Commission's rules of practice and due process. However, even with its supporting affidavits, and even had they been

¹ While parties that signed a proprietary agreement may have received some SBC work papers, SBC never bothered to serve XO, CIMCO or Forte with information sent to the ALJs. At a minimum this constitutes *ex parte* communications in a contested proceeding. SBC has argued that several CLECs received specific information in ICC Docket 02-0864. The problem of course is no one really knows whether the affidavits contain the same material; the documents were never evidence in 02-0864 and not all the parties are the same in each docket.

properly served on the parties, SBC has not met its burden to prove all the changes it has made to the ICC's last lawful rates in ICC Docket No. 96-0486.

II. SBC'S ADJUSTMENT FACTORS DO NOT, AS IT ALLEGES, SIMPLY "ISOLATE" CHANGES DUE TO THE NEW FILL FACTORS AND DEPRECIATION RATES.

The Proposed Order accepted SBC's method of determining its adjustment factors. SBC asserts it first ran its LoopCAT model from 02-0864 using SBC's actual fill actors and depreciation rates (i.e., those SBC asserts were mandated by 13-408). *Id.* at 4. SBC then allegedly reran the cost study from 02-0864 using the fill factors and depreciation rates used to develop the existing rates in the original TELRIC proceeding (Docket 96-0486). *Id.* "According to SBC, the effect of calculating the adjustment factors in the manner described above was to isolate and measure the impact on UNE loop costs of changes in only two inputs: fill factors and depreciation rates." *Id.* Even though the Proposed Order acknowledged that the only two inputs that it has been commanded to alter are fill factors and depreciation rates (Proposed Order at 13), the Proposed Order accepted SBC adjustment factors that were determined using hundreds (if not thousands) of inputs contained in SBC's LoopCAT model. A correct determination of SBC's adjustment factors would be to insert the legislatively mandated fill factors and depreciation rates, along with all of the other assumptions and inputs used to develop rates in Docket 96-0486, into SBC's 02-0864 model. However, SBC claims that it can no longer produce the only Commission approved cost model, assumptions and inputs used to generate UNE loop rates in Docket 96-0486. Joint CLEC Ex. 1, ln. 3. Direct Testimony of SBC witness James Smallwood at 23. Thus, there is no evidentiary

basis to support the Proposed Order's conclusion that SBC correctly determined, let alone "isolated", its adjustment factors.

SBC has pulled a bait and switch with the General Assembly and this Commission. First SBC told the General Assembly that it could adjust current UNE rates by incorporating the effect of mandated fill factors and depreciation rates and changing nothing else. Now SBC tells the Commission that it threw out the model used to develop current UNE rates so it must estimate the impact of the legislation by using its adjustment factor applied to the hundreds of new assumptions and inputs contained in its Docket 02-0864 proposal – assumptions and inputs that represent SBC's wish list of ratemaking decisions. The ICC is not required to accept SBC's attempt to game this administrative process.

CLECs and their customers should not be the ones that have to pay for SBC's duplicity. This Commission is not required to accept SBC's second best solution for the problem it created by throwing out the only data that would allow the Commission to implement Section 13-408. The rate adjustments required by Section 13-408 must be done correctly or not at all. Because SBC has caused the problem, the only legal solution must be to maintain current rates.

III. PROPOSED CHANGES TO THE ADMINISTRATIVE LAW JUDGES' PROPOSED ORDER

XO, CIMCO and Forte propose the following changes to the ALJs' Proposed Order:

~~Using the statutorily mandated models and methodologies,~~ SBC allegedly ran the cost study for Docket 02-0864 twice: once using the fill factors and depreciation rates from Docket 96-0486 and once using the fill factors and depreciation rates from Docket 02-0864. SBC claims that this allowed the Company to isolate the effect of the statutorily mandated fill

factors and depreciation rates. From this, SBC calculated the adjustment factor that SBC applied to the Commission approved UNE rates from Docket 96-0486. ~~We agree with Staff and accept SBC's adjustment methodology which does not examine individual inputs, but instead seeks to obtain a percentage representing a change in rates due to depreciation rates and fill factors. Based on the time constraints placed on us by the General Assembly, we conclude this was the legislature's intent. We believe that SBC's approach does not comply with Section 13-408 because it incorporates assumptions and inputs from the company's 02-0864 proposal that have not been approved by this Commission. The only assumptions and inputs that have been approved are those used to support the rates approved in Docket 96-0486. The only assumptions and inputs that Section 13-408 allows the Commission to use to modify UNE rates are the statutorily mandated fill factors and depreciation rates. If SBC is unable to comply with Section 13-408 because it disposed of the model, assumptions and inputs used to develop rates in Docket 96-0486, then SBC is at fault. This Commission is not required to accept SBC's second best solution for the problem it created by throwing out the only data that would allow the Commission to implement Section 13-408. The rate adjustments required by Section 13-408 must be done correctly or not at all. Because SBC has caused the problem, the solution must be to maintain current rates.~~

Proposed Order at 13.

* * *

It is clear from the plain language of the statute that we are to implement ~~compliant~~ rates consistent with the statute's mandate within 30 days of the enactment of Section 13-408, a period of time that is insufficient to conduct a detailed investigation and review of the model inputs at issue, as several of the parties would have us undertake.

Proposed Order at 12.

* * *

~~The merits of these models and methodologies have been determined by Section 13-408.~~

Proposed Order at 12.

CONCLUSION

XO, CIMCO and Forte respectfully request that the Administrative Law Judges' Proposed Order is changed consistent with the arguments contained herein.

Respectfully submitted,

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